

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OLLIE HOQUE and DEPARTMENT OF THE NAVY,
REGIONAL MEDICAL CENTER, Long Beach, CA

*Docket No. 98-1779; Submitted on the Record;
Issued June 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation on the grounds that her actual earnings fairly and reasonably represented her wage-earning capacity.

In the present case, the Office accepted that appellant sustained a lumbosacral sprain, left foot contusion, and herniated nucleus pulposus in the performance of duty on December 4, 1977. By decision dated September 30, 1997, the Office reduced appellant's compensation, finding that her employment since February 1997 as a home health care nurse represented her wage-earning capacity. In a decision dated April 8, 1998, an Office hearing representative affirmed the wage-earning capacity determination.

The Board has reviewed the record and finds that the Office improperly reduced appellant's compensation in this case.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.¹

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.² Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not

¹ *Gregory A. Compton*, 45 ECAB 154 (1993).

² 5 U.S.C. § 8115(a).

fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.³

In the present case, appellant submitted a Form CA-1032 dated August 16, 1997, indicating that she had been employed since February 1997 with a health care firm. Appellant indicated that she worked 16 hours per week, at \$6.00 per hour. Based on this evidence, and without further explanation, the Office concluded that her wages of \$96.00 per week fairly and reasonably represented her wage-earning capacity.

In reviewing whether actual wages fairly and reasonably represent wage-earning capacity, the Board examines the record for evidence that the employment "constitutes part-time, sporadic, seasonal, or temporary work."⁴ The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

"a. *Factors considered.* To determine whether the claimant's work fairly and reasonable represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

"For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) [United States Parcel Service] position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional USPS worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

"(1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;

"(2) *The job is seasonal* in an area where year-round employment is available....

"(3) *The job is temporary* where the claimant's previous job was permanent."⁵

It is evident that in this case appellant's job was part time; she indicated that she worked four hours per day, four days per week. Her date-of-injury position was a full-time position as a nurses aide. As the above provision indicates, a part-time position is generally not appropriate for a wage-earning capacity determination unless the date-of-injury position was also part time. The Office made no reference to this provision or otherwise attempted to explain why a part-time

³ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁴ *See Monique L. Love*, 48 ECAB 378 (1997).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

position was appropriate in this case. The Board finds that the Office did not follow its own procedures in determining appellant's wage-earning capacity. It is the Office's burden to reduce compensation, and they failed to meet their burden in this case.

The decisions of the Office of Workers' Compensation Programs dated April 8, 1998 and September 30, 1997, are reversed.

Dated, Washington, D.C.
June 26, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member